

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 5 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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DARAJI CHUNILAL JIVRAJ

Versus

RAIBEN KANJIBHAI PATEL

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Appearance:

MR VH DESAI for Petitioner  
SERVED for Respondent No. 1, 7, 8, 9,10  
UNSERVED for Respondent No. 2  
MR AN PATEL for Respondent No. 3  
MR JR NANAVATI for Respondent No. 4

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CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 04/07/97

ORAL JUDGEMENT

1. This revision application is filed by the defendant No.4 under section 115 of C.P.Code challenging the order passed by the Jt.Civil Judge(SD), dated

29.12.1989 whereby the defendant has applied for staying the execution petition which is rejected on the ground that there is no provision for staying the execution proceedings when a valid decree is passed in SCS No.180/82. The application appears to have been given under Order 21 Rule 26 of the C.P.Code.

2. It appears that the respondent Nos 1 to 9 who are the original plaintiffs instituted SCS No.180/82 in the court of Jt.Civil Judge (SD), Ahmedabad Rural at Narol to recover the amount of Rs.1 lac together with interest and costs. Summons of the suit was served on the present petitioner who is defendant No.2 as well as respondent No.10 who is defendant No.1. Admittedly an advocate was engaged by them to defend the suit and it is their say that their advocate has retired and the suit was decreed by the trial court by passing decree against defendants on 11.12.86 for an amount of Rs.79,000/payable by them jointly and severally together with proportionate costs and interest at the rate of 6% from the date of suit till realisation. According to defendant he even did not know the address and name of his advocate to whom he engaged to defend the suit but on 3.2.88 he received the notice from the Civil Judge(SD) Mehsana and at that time for the first time he came to know that decree for an amount of Rs.79,000/- is passed. Immediately thereupon he rushed to Ahmedabad on 4.3.88 and enquired of the advocate who informed him that he will receive notice of execution. To his surprise even the advocate was not aware of any decree having been passed. But on enquiry he found that on 10.1.1986 his advocate has retired and that thereafter the exparte decree came to be passed. It is thereafter that the application for execution is filed wherein he has applied for stay and the trial court has rejected the application at Exh.22 in execution Application No.1/88.

2. Mr.V.H.Desai, Learned Advocate for petitioner-defendant has submitted before this court that the decree was an exparte decree and despite exercise of due diligence on his part his advocate retired without informing him and therefore the execution of the decree was required to be stayed and he should be permitted to defend the suit of the plaintiff on merits. On the other hand, Mr.J.R.Nanavaty, Ld.advocate for plaintiffs submit that once the summons of the suit is served on the defendant and defendants have appeared by engaging advocate and the advocate has retired from the proceedings, in accordance with law the court has no option but to proceed to pass decree as the suit of the plaintiffs practically remains undefended.

3. Having given my anxious thought and consideration to rival submissions it shall have to be stated that the order passed by the trial court dated 29.12.89 is just and proper and execution proceedings can not be stayed without imposing any reasonable condition. It is required to be noted that the suit of the plaintiff is of the year 1982 and he has not been in position to get the fruits of his decree despite a decree having been passed in his favour because either the defendants or their advocate were not vigilant enough to defend the suit. In the facts and circumstances of the case, the ends of justice will be met if the defendants are directed to deposit the amount of Rs.40,000/- in the executing court within six weeks from today which the plaintiff shall be at liberty to withdraw on furnishing sufficient surety. This court is informed by Mr.Nanavaty that the proceedings for setting aside the exparte decree are already filed in the court of Jt.Civil Judge(SD) Ahmedabad (Rural) at Mirzapur, and they are separate proceedings yet pending. In view of the order passed by this court the court before which such proceedings are pending being the court of 2nd Jt.Civil Judge (SD) Ahmedabad(Rural) at Mirzapur shall proceed to pass appropriate order so as not to defeat the ultimate heart and spirit of this order and the rights of the defendants. Rule is accordingly made absolute to the aforesaid extent only. No costs.